11 USC § 523(a)(6)
Fed R Bankr P 4004(a)
Fed R Bankr P 7015
Fed R Ev 408
42 USC § 1396(a)(32)
ORS 414.095

Capital Resource Finance Corp. v. Foster, Civ. No. 93-1116-RE
Adv. No. 91-3257-P

In re Foster

10/28/93 J. Redden aff'g DDS oral ruling

The district court affirmed a judgment against the debtor for $47,000. The judgment was non dischargeable as a willful and malicious injury because the debtor converted the proceeds of the creditor's collateral. The collateral was a check for government medical assistance payments.

The district court found:

1) The allegations in the original complaint were adequate to describe a cause of action under 523(a)(6). The facts were the same as those alleged for the original 523(a)(2) claim, so the amendment related back to the original complaint.

2) The debtor was not unduly prejudiced by the addition of the 523(a)(6) claim at trial because the facts were the same, and the court offered to extend the trial if requested.

3) The evidence regarding settlement discussions was either admissible for the purpose of refuting the existence of a guaranty limiting liability, or was harmless error if inadmissible.

4) The debtor suffered no surprise or prejudice when the court allowed testimony of a witness who was not included on the witness lists, but was discussed by both parties.

5) The creditor had an interest in the check which the debtor converted. Federal law prohibits a direct payment of government medical assistance payments to a factor. However, a security interest in medical assistance accounts is not per se illegal under federal law. Under Oregon law, the assignment of a medical assistance account to the creditor would be unlawful. The debtor did not establish that a security interest in the accounts was an illegal assignment, and even if he had, his own actions in converting the check were enough to prohibit him from asserting the defense due to "unclean hands".

FILED

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

OCT 28 1993

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In re: CARL AND PATRICE FOSTER, Debtors,	Civil No. 93-1116-RE
CAPITAL RESOURCE FINANCE CORPORATION, an Oregon corporation, Plaintiff/Appellee, vs. CARL FOSTER, Defendant/Appellant, PATRICE FOSTER, Defendant.	Adversary Proceeding No. 91-3257 OPINION

Certified to be a true and correct copy of original filed in my office.
Dated 10/29/93
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By A. Priestley Deputy

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REDDEN, Judge:

Defendant Carl Foster appeals the judgment of the bankruptcy court that a debt of $47,998.53 is not dischargeable under 11 U.S.C. § 523(a)(6). For the reasons stated below, the judgment is AFFIRMED.

PROCEDURAL BACKGROUND

Carl and Patrice Foster (the Fosters) filed a petition for relief under Chapter 7 in March 1991. ER 6. Capital Resource Finance Corporation (Capital) filed a complaint on June 5, 1991, alleging that debts owed it should not be discharged in bankruptcy under 11 U.S.C. § 523 (a)(2)(A) and (B), which provide that a debt obtained by false pretenses, false representations, actual fraud, or certain written statements is not dischargeable. ER G. The complaint was amended on August 21, 1991 to allege new facts. ER H. The parties filed a pretrial order on December 10, 1991. ER I.

Trial before bankruptcy judge Donal D. Sullivan was held between January 5 and 12, 1993. On the second day of trial, January 6, Judge Sullivan stated his intention to make additional findings under 11 U.S.C. § 523 (a)(6). ER Transcript at 230. That section provides that a debt resulting from willful and malicious injury to the property of another is not dischargeable. The next day, Capital filed a motion to amend its complaint to conform to the evidence. ER 9.

Carl Foster objected to the addition of the new legal theory. ER Transcript at 352. Judge Sullivan allowed the new theory, but granted a continuance in the trial from the afternoon of Friday, January 8 until Tuesday morning, January 12, 1991. Id. at 632. The judge also stated that he would consider a request for a further continuance on Tuesday. Id. None was made. Evidence on the (a)(6) claim was heard on Tuesday, January 12, the last day of trial.

On January 15, 1991, Judge Sullivan issued findings of fact and conclusions of law in a telephone conference. ER D. Capital prevailed on one claim: the (a)(6) claim against Mr. Foster for $47,998.53 plus interest. Id. All other debts of the Fosters were discharged. Id.

Mr. Foster filed a notice of appeal on January 25, 1993. ER B. Capital filed an objection to Bankruptcy Appellate Panel determination on February 12, 1993. Objection to Determination by BAP, Document No. 70. Accordingly, this court has jurisdiction under 28 U.S.C. § 158 (a).

STATEMENT OF THE FACTS

Mr. Foster was the president of Quality Health Services, Inc. (Quality), a corporation that managed the operations of Parkrose Nursing Home (Parkrose). When Quality had financial difficulties in early 1990, Mr. Foster, on behalf of Quality, entered into a Security Agreement (Agreement) with Capital. ER 1.

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The Agreement provided that Capital would take assignment of accounts receivable selected by Quality for an amount less than face value. Id. The accounts represented payments from various sources, including the state Senior and Disabled Services Division. Quality continued to collect on the accounts. In addition, Capital took a security interest in all receivables. Id.

The Fosters signed a personal guaranty making them jointly and severally liable for Quality's debts under the Agreement. ER 3.

In September 1990, Mr. Foster signed an agreement with the Parkrose property lessor, West Coast Management (West Coast) through Parkrose Properties. ER Transcript at 576. The agreement provided that Mr. Foster would surrender Parkrose to West Coast if rent was not properly paid. Id. On January 1, 1991, West Coast took over Parkrose pursuant to the Agreement. Id. at 581. On that same day, Mr. Foster began working for West Coast. Id. Capital was not informed of these events. Id. at 578, 154.

The debt at issue in this appeal stems from an invoice representing monies owed Quality/Parkrose by the state Senior and Disabled Services Division. The invoice was assigned under the Agreement to Capital. On January 7, 1991, Mr. Foster drove to the Senior and Disabled Services Division office in Salem with Mr. Holmberg (the manager of Parkrose) and picked up a check for $47,998.53 made payable to Parkrose. Id. at 645-56.

The check represented payment under the invoice. That day, Mr. Foster gave the check to Mr. Holmberg. Id. at 598.

Later when asked about the payment, Mr. Foster lied to Capital's principal, Mr. Maring, about receiving the check, and said that the state was still processing the payment. Id. at 456. The check proceeds were not paid to Capital. Id. at 195.

TRIAL COURT'S DECISION

The bankruptcy judge issued his findings of fact and conclusions of law in a telephone conference on January 15, 1993. ER D. Capital prevailed on only one claim, the (a)(6) claim against Mr. Foster for $47,998.53 plus interest. Id.

Pertinent to this appeal, the judge found the following facts. On or about January 1, 1990 [sic 1991] Quality's landlord repossessed Parkrose and applied for Quality's operating license. Id. at 4. On January 7, 1991, Mr. Foster drove to Salem to collect a check for $47,998.53. Id. at 8. Instead of paying the check over to Capital, who owned the account, he delivered it to his office manager and then lied to Mr. Maring. Id. Mr. Foster knew that the office manager would divert those funds to purposes other than paying Capital.

The judge also made the following conclusions of law. That, under In re Cecchini and In re Risso, Mr. Foster willfully and maliciously injured Capital's property. Id. The Agreement was not unlawful under federal law. Id. On the issue of whether the Agreement was lawful under state law, the judge said:

> I am very reluctant to disapprove or even to interpret the legality of state practice, which is sanctioned by state regulation, and which involved public obligations, without the state or federal agency being a party, or without the clear showing of legality or illegality, and such showing has not been made.

Id. The judge also concluded that Capital's original complaint contained enough facts as to the $47,998.53 check to put Mr. Foster on notice and to support an additional legal theory at trial. Id. at 9-10.

STANDARD OF REVIEW

The bankruptcy court's conclusions of law are reviewed de novo by this court. In re Mellor, 734 F.2d 1396, 1399 (9th Cir. 1984). The bankruptcy court's findings of fact are reviewed under the "clearly erroneous" standard. Fed. R. Bankr. P. 8013; Mellor, 734 F.2d at 1399.

Matters within the discretion of the trial court are reviewed under the abuse of discretion standard. The granting of leave to amend a complaint falls under this standard. Mende v. Dun and Bradstreet, 670 F.2d 129, 131 (9th Cir. 1982). A trial court's ruling on the admissibility of evidence is also reviewed for abuse of discretion. United States v. Catabran, 836 F.2d 453, 456 (9th Cir. 1988). The trial judge's decision must not be disturbed unless the reviewing court is left with the "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." Mission

Indians v. American Management and Amusement, Inc., 840 F.2d 1394, 1408 (9th Cir. 1987).

DISCUSSION

Mr. Foster raises the following six assignments of error.

1. Amendment of Complaint During Trial

He contends that it was an abuse of discretion for the trial judge to allow Capital to amend its complaint to conform to the evidence on the third day of trial. The amendment added the successful (a)(6) claim. Mr. Foster argues that the (a)(6) claim was legally and factually unrelated to the (a)(2) claims that were previously alleged in the complaint. He claims that the amendment created undue prejudice because he did not have adequate time to prepare his defense at trial.

Capital counters that the amendment properly related back to the original complaint because it merely added a new legal theory, not new factual allegations. Further, Mr. Foster was not, in fact, prejudiced at trial.

After the expiration of the 60-day period imposed by Fed. R. Bankr. P. 4004(a), a complaint cannot be amended, except with leave from the court. A new claim alleged in an amended complaint relates back to the original complaint if it "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Bankr. P. 7015, Fed. R. Civ. P. 15(c).

The trial court determined that the original complaint contained sufficient facts to put Mr. Foster on notice and to support a change in legal theories. ER 11 at 10. This determination will not be upset unless it was an abuse of discretion. Mende, 670 F.2d at 131.

In re Gunn outlines two standards for determining whether new allegations are part of the same conduct, transaction or occurrence. In re Gunn, 111 B.R. 291 (Bankr. 9th Cir. 1990). The looser standard requires a "general nexus between the original and amended complaints" such as the same loan or relationship, while the more stringent standard requires a "closer identity between the facts that would be provable" under the causes of action alleged in the original and amended complaints. Id. at 293.

Among the allegations in the original complaint were:

> In January 1991, Carl Foster represented that Senior Services had failed to pay an account receivable to Quality which had been factored to [Capital]. This representation was false. Carl Foster had personally picked up the check from Senior Services and turned the check over to employees of Quality for deposit into Quality's bank account or some other bank account.

ER 7. These facts were alleged to support Capital's (a)(2) claim. An (a)(6) claim requires proof that the debtor willfully and maliciously injured the property of another.

In this case, both Gunn standards were met. The allegations of the original complaint described the events supporting the new cause of action. That Mr. Foster picked up the $47,998.53 check from the state, lied about the receipt and failed to give Capital money that was its property, is all alleged with particularity in the original complaint. Only the legal theory was new. Not only was there a "general nexus" between the complaints, there was substantial factual similarity.

This case is analogous to In re Fondren. As in this case, the creditor in Fondren alleged an (a)(2) claim but amended its complaint to add an (a)(6) claim. The complaint in Fondren alleged that the debtor had converted property of the creditor by cashing a check belonging to the creditor. The court allowed the complaint to be amended because the original factual allegations supported the new claim. In re Fondren, 119 B.R. 101, 105 (Bankr. S.D. Miss. 1990).

The Fondren complaint stated that the debtor had "converted" the check, lending itself easily to an (a)(6) conversion theory. Nonetheless, the facts alleged in this case and Fondren are very similar. Both alleged that the debtor wrongfully took a particular check that belonged to the secured party. In both cases the complaints were amended during trial. Id. at 102. Here, as in Fondren, the (a)(6) claim arose out of the same transaction alleged in the original complaint.

Mr. Foster's contention that he was unduly prejudiced at trial by the addition of the (a)(6) claim is without merit. On the second day of trial, January 6, the bankruptcy judge notified the parties that he would make findings under (a)(6) and might allow the complaint to be amended. ER Transcript at

230-31. On January 7, Capital filed a motion to amend the complaint to conform to the evidence. ER 9. On Friday, January 8, the bankruptcy judge continued the trial until Tuesday, January 12 and expressly stated that motions for a further continuance would be entertained on January 12. ER Transcript at 632. On January 12, no motion for a further continuance was made.

While the (a)(6) legal theory was first presented at trial, the facts were not. Mr. Foster had full notice of the facts surrounding the check conversion. In addition, the witnesses who appeared at trial were known to Mr. Foster. The judge was aware of Mr. Foster's objection to the new claim. A continuance was granted. If Mr. Foster had felt that he needed further time, he could have made that request. The judge specifically told the parties that he would entertain such a motion. Mr. Foster was not unduly prejudiced by the amendment.

2. Statements Regarding Settlement

Mr. Foster argues that introduction of evidence regarding settlement was an abuse of discretion. Capital contends that the evidence was offered for impeachment and, therefore, was admissible under FRE 408.

On the second day of trial and during a motion on the destruction of evidence, Capital's attorney made a reference to Mrs. Foster's previous willingness to settle the case for $60,000. ER Transcript at 221. The motion dealt with a claim by Mrs. Foster's attorney that a guaranty limiting the liability of the Fosters to $10,000 had been lost while in the possession of Capital. In referring to the offer to settle made by Mrs. Foster, Capital's attorney was casting doubt on her claim that a guaranty limiting liability existed. Id. That is, if the guaranty existed, why would she seek to settle for six times the liability limitation?

Under Fed. R. Evid. 408, settlement evidence can be offered for a purpose other than proving liability for, or the validity or amount of, a claim. Fed. R. Evid. 408. The settlement evidence was offered to refute the claim that a guaranty existed. For that purpose, the evidence was admissible.

Even if the evidence was inadmissible, the error would be harmless. The judge stated that he would ignore any settlement evidence. ER Transcript at 221. Under either harmless error standard, it can be said with "fair assurance," or that it is "more probable than not," that any error was harmless. United States v. Hitt, 981 F.2d 422, 425 (9th Cir. 1992).

3. Testimony of Witness

Mr. Foster claims that the calling of an unlisted witness on the last day of trial was error. Capital responds that there was good cause for the judge to allow the testimony because it was necessary to rebut the testimony of Mr. Foster, and that Mr. Foster suffered no surprise or prejudice.

On the last day of trial, Dexter Henderson, a Senior Services employee, testified regarding Mr. Foster's receipt of the $47,998.53 check. While Mr. Henderson did not appear on any of the parties' witness lists, he was known to the parties. In fact, on Thursday, January 7, Mr. Foster's counsel indicated that he wished to call Mr. Henderson to explain inconsistencies in Mr. Foster's testimony. ER Transcript at 559, 561. Counsel for Capital stated that arrangements had already been made for Mr. Henderson to be available as a witness. Id. Mr. Henderson was not called as a witness until January 12.

In light of Mr. Foster's own stated desire to call Mr. Henderson and the forewarning given to Mr. Foster that Capital was intending to call Mr. Henderson, Mr. Foster suffered no prejudice and the judge did not abuse his discretion.

4. Illegality of Security Agreement

Mr. Foster next contends that the Agreement between Quality and Capital that he personally guaranteed was illegal under federal and Oregon law.

The bankruptcy judge found that the Agreement was not illegal under federal law and appears to have found that Mr. Foster did not meet his burden of showing that the Agreement was illegal under state law. ER D at 8-9.

This court must review this legal conclusion de novo. Mellor, 734 F.2d at 1399.

While this is not a contract enforcement action, the (a)(6) claim requires proof that Capital had a property interest in the $47,998.53 check. Because Capital's property interest is based on the Agreement, a successful illegality argument would leave Capital without an (a)(6) claim.

A. Legality Under Federal Law

The Agreement provided that Quality could designate accounts receivable that Capital would purchase at a discount. The $47,998.53 check at issue in this case represented an account that had been assigned by Quality to Capital under the Agreement. Capital's property interest, upon which the (a)(6) claim was premised, was based on the assignment of the account and on a security interest that Capital took, under the Agreement, in all of Quality's receivables.

The check that Mr. Foster picked up from Mr. Henderson was for medical assistance payments. The check was made payable to Parkrose, not Capital.

Under federal law, medical assistance payments cannot be paid directly to a factor: "no payment under the plan for any care or service provided to an individual shall be made to anyone other than such individual or the person or institution providing such care or service[.]" 42 U.S.C. § 1396a (32) (1988).

This provision was designed to prevent a provider from assigning its rights "to other organizations or groups under conditions whereby the organization or group submits claims and receives payment in its own name." H.R. Rep. No. 231, 92d Cong., 2nd Sess., reprinted in 1972 U.S.C.C.A.N. 4989, 5090.

Under portions of the Agreement, Capital could collect accounts directly. And, if the $47,998.53 check had been payable to Capital, rather than Parkrose, payment to Capital would have violated federal law. But such was not the case. The transaction at issue in this case did not involve a payment of medical assistance funds directly to anyone other than a provider of services. Therefore, it did not violate 42 U.S.C. § 1396a.

While Capital did not receive a direct payment from the government, it did have a security interest in medical assistance accounts, including the $47,998.53 check. A security interest in medical assistance is not per se illegal under federal law. United States v. Northwest Commerce Bank, 727 F. Supp. 403, 406 (N.D. Ill. 1989), In re Missionary Baptist Foundation, 796 F.2d 752, 759 (5th Cir. 1986), In re American Care Corp., 69 B.R. 66, 67 (Bankr. N.D. Ill. 1986). There is no evidence that Capital's security interest in the payment would have frustrated Congressional intent. In fact, "a prohibition on security interests in accounts receivable might cripple a provider's ability to obtain financing." Northwest Commerce Bank, 727 F. Supp. at 406.

B. Legality Under State Law

While not completely clear from the record, the bankruptcy judge appears to have held that Mr. Foster did not meet his burden in establishing a defense of illegality under state law. See supra Trial Court's Decision discussion, at 5.

Oregon law is broader than federal law. Under Oregon law,

> [n]either medical assistance nor amounts payable to vendors out of public assistance funds are transferable or assignable at law or in equity and none of the money paid or payable . . . is subject to execution, levy, attachment, garnishment or other legal process.

Or. Rev. Stat. 414.095 (1991). Under this provision, the assignment of the medical assistance account by Quality to Capital was unlawful.

However, Capital's property interest in the $47,998.35 medical assistance check was also based on a security interest independent of the account assignment. The issue thus becomes whether a security interest in medical assistance is an assignment under Oregon law. Mr. Foster has not made a sufficient demonstation that it is.

While there is no legislative history or case law interpreting the provision, the use of the words "assignable" and "transferable" suggests that the Oregon Legislature sought to prohibit complete transfers, rather than the granting of security interests. First,

> [a]n assignment has traditionally been defined in the law of contracts as a transfer by the assignor of all rights in the property assigned to the assignee. It effects an absolute and irrevocable transfer of ownership.

In re Apex Oil Co., 975 F.2d 1365, 1369 (8th Cir. 1992).

Second, prohibition of security interests in medical assistance might frustrate federal medicare goals by undercutting a "vital means of financing medical assistance for the needy." Missionary Baptist Foundation, 796 F.2d at 758; see also Northwest Commerce Bank, 727 F. Supp. at 406 ("[A] prohibition on security interests in accounts receivable might cripple a provider's ability to obtain financing[.]"). The Fifth Circuit, interpreting a nearly identical statutory provision concluded that the statute would conflict with the federal goals if it were interpreted to prohibit a security interest in medical assistance. Missionary Baptist Foundation, 796 F.2d at 756-59.

Even if the granting of a security interest in the medical assistance account was illegal under Oregon law, Mr. Foster does not come with clean hands to enforce the illegality.

Bankruptcy is a court of equity. Pepper v. Litton, 308 U.S. 295 (1939). A person seeking to benefit from the unclean hands doctrine must have acted "fairly and without fraud or deceit as to the controversy in issue." Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1097 (9th Cir. 1985). The judge found that Mr. Foster willfully and maliciously injured Capital's property. He is, therefore, not in a position to raise this shield.

In conclusion, Mr. Foster has failed to demonstrate that the Agreement was illegal under federal or state law and, even if it were, his hands are sufficiently dirty to prohibit him from successfully asserting the defense.

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5. Willful and Malicious Standard

Mr. Foster also argues that the bankruptcy judge erred in applying the willful and malicious standard of Cecchini rather than that of Davis. Capital counters that the use of the Cecchini standard was proper and that the Davis standard is subsumed in the Cecchini standard. I review the judge's legal conclusion de novo.

Under 11 U.S.C. § 523(a)(6), a debt is not dischargeable for "willful and malicious injury by the debtor to another entity or to the property of another entity[.]" 11 U.S.C. § 523(a)(6) (1988). The Ninth Circuit, in Cecchini, interpreted this section to mean that "[w]hen a wrongful act such as conversion, done intentionally, necessarily produces harm and is without just cause or excuse, it is 'willful and malicious' even absent proof of a specific intent to injure." In re Cecchini, 780 F.2d 1440, 1443 (9th Cir. 1986).

In Davis, the Supreme Court held that a willful and malicious injury does not necessarily follow from every act of conversion. Davis v. Aetna Acceptance Co., 293 U.S. 328, 332 (1934). "There may be a conversion which is innocent or technical, an unauthorized assumption of dominion without wilfulness or malice." Id. An "honest, but mistaken belief" also is not willful or malicious. Id.

Cecchini follows from Davis. Under Cecchini, it must be shown that 1) the debtor committed a wrongful act, 2) which necessarily caused harm, and 3) which was without justification or excuse. In re Littleton, 942 F.2d 551, 554(9th Cir. 1991). While this standard does not require specific intent to injure, it does preclude a "technical", "innocent" or "honest, but mistaken" conversion from being willful and malicious under (a)(6). Davis does not require more. The bankruptcy judge properly chose the Cecchini standard.

Mr. Foster discusses at length the judge's application of the standard to the evidence. While the issue on appeal is the propriety of the standard and not its application, the judge's conclusion that Mr. Foster's conversion of the $47,998.35 check was willful and malicious under Cecchini was not clearly erroneous.

The judge found that

> [Mr. Foster] did, on January 7, 1991, drive to Salem to collect a check in the amount of $47,998.53. Instead of paying it over to Capital, who owned the account, he delivered it to his office manager and then lied to [Capital]. I am satisfied that in doing so he knew that the office manager would divert those funds to other purposes -- or purposes other than paying Capital. As a consequence, Mr. Foster willfully and maliciously injured Capital's property[.]

ER D at 8.

Cecchini requires that the debtor's act be wrongful, necessarily causing harm, and without justification or excuse. Cecchini. Cecchini, 780 F.2d at 1443.

First, the evidence supports a finding that Mr. Foster's conversion of the check was wrongful. Mr. Foster testified

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that he had been threatened by Mr. Holmberg on January 7 and that West Coast management was "going to steal funds from me and [Capital]." ER Transcript at 492-93. That day, Mr. Foster picked up the check with Mr. Holmberg, gave the check to Mr. Holmberg who, in Mr. Foster's presence, turned it over to Mr. Hahn. Id. at 495-96, 646. While Mr. Foster testified that he objected to Mr. Holmberg giving the check to Mr. Hahn, he did not attempt to stop payment on the check or notify Capital. Id. at 495-97. He then lied to Mr. Maring of Capital about receiving the check. Id. at 453. The record also includes evidence that Mr. Foster pled guilty to a charge of aggravated theft of other state accounts. Id. at 23, ER 4.

Second, this evidence also supports a finding that Mr. Foster's act necessarily caused harm. Under Cecchini, an act necessarily causes harm if the act would almost certainly be harmful to the creditor. Littleton, 942 F.2d at 555. The judge found that Mr. Foster "knew" that the money would be diverted and not paid to Capital when he gave Mr. Holmberg the check. ER D at 8.

Finally, the evidence supports a conclusion that Mr. Foster's act was without just cause or excuse. Despite Mr. Foster's contention, the fact that he often picked up the medical assistance checks from the state office in Salem does not mean that Capital consented to Mr. Foster's conversion.

The bankruptcy judge's application of the legal standard to the facts in this case was not clearly erroneous and are, therefore, upheld.

6. Cause of Harm Standard

Mr. Foster's last assignment of error is that the bankruptcy judge should have applied the "substantial certainty" standard of Rainey rather than a "strong probability" standard. Capital argues that Cecchini provides the correct standard and that, in any event, the judge's finding meets all of the standards.

Under Rainey, there must be a "substantial certainty" that the debtor's act will cause injury. In re Rainey, 1 B.R. 569, 573 (Bankr. D. Or. 1979). As discussed above, Cecchini similarly requires that the act "necessarily produce harm." The bankruptcy judge applied the Cecchini standard and found that Mr. Foster "knew" that Capital would not be paid when he gave Mr. Holmberg the check. ER D at 8. There is no evidence, despite Mr. Foster's protestations, that the judge applied a "strong probability" standard. The judge's finding surpasses the requirement of either the Rainey or Cecchini standards. Therefore, there was no error.

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CONCLUSION

Having found that Mr. Foster's assignments of error lack merit, I AFFIRM the judgment of the bankruptcy court. Mr. Foster's request for oral argument is DENIED.

Dated this 27 day of October, 1993.

JAMES A. REDDEN
United States District Judge